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## MEMORANDUM

**TO:** John Shively

**FROM:** Matt Singer 

**DATE:** September 28, 2011

**RE:** Summary of Court Opinion in *Nunamta Aulukestai v. State, DNR & Pebble Limited Partnership*

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The environmental law firm Trustees for Alaska, on behalf of several plaintiffs, brought a lawsuit against the State asserting five different legal theories as to why the State of Alaska had allegedly violated various sections of the state constitution by not conducting a best interest finding and public notices prior to granting temporary land use and water use permits for mineral exploration at the Pebble Project. Plaintiffs sought an injunction to prevent further exploration at the deposit, and asked the court to invalidate the current laws and statutes that govern the Department of Natural Resources' regulation of mineral exploration on state lands. The common theme in all of plaintiffs' claims was that mineral exploration causes such significant environmental harms that it amounts to a "disposal" of state land and excludes other users and uses of the same lands.

After two years of litigation, massive discovery, and a two-week trial in December 2010, Anchorage Superior Court Judge Eric A. Aarseth took the matter under advisement and then issued a 154-page opinion on September 26, 2011. The court ruled in favor of the State and Pebble Limited Partnership in all respects, finding that "Plaintiffs failed to prove their case." The court's lengthy opinion delves into great detail on each of the many factual issues presented during the trial. Here is an outline of the key factual and legal findings:

- The land and water use permits issued to PLP are actually and functionally revocable and do not constitute a disposal under the Alaska Constitution.
- The permits and associated exploration do not unconstitutionally impinge on reasonable concurrent uses under the Alaska Constitution.
- Plaintiffs failed to prove that there were long-term or harmful environmental impacts from Pebble's drilling operations.
- There is no persuasive evidence that drilling activities have caused impacts to fish or fish habitat.

- Plaintiffs' evidence was insufficient to show that drilling activities have caused impacts to wildlife or wildlife habitat.
- There is no evidence of permanent or long term environmental harm resulting from fuel spills.
- There is no evidence that mineral exploration activities have caused significant and permanent impacts to vegetation.
- There is no evidence that exploration activities have impacted any archeological or cultural resources.
- Pebble's permits do not provide for exclusive use of state land or waters.
- Pebble's drilling operation and water withdrawals do not impact reasonable concurrent use of water by fisheries resources.
- Plaintiffs failed to prove that drilling operations impacted reasonable concurrent use of state lands by wildlife resources.
- Pebble's exploration activity has not excluded hunting guides.
- Plaintiffs failed to prove that exploration activity has impacted or excluded subsistence users.

The court observed that "[t]he evidence shows that more than 20 years after minerals were first discovered at Pebble, the site continues to have pristine water and support wildlife and fisheries resources. The harms that Plaintiffs' witnesses describe are speculative; they are neither harms occurring in fact nor did they show that the harm will necessarily occur."

As is typical in an environmental dispute, the trial focused on a number of technical, scientific issues. Plaintiffs presented various scientists who testified about how mineral exploration could "potentially" or "possibly" cause changes to water chemistry, soils, and wildlife. In response, PLP asked its expert consultants to analyze data and then offer opinions based on that data on whether or not mineral exploration had in fact caused harm. A major theme of PLP's defense, from the opening argument, was that "good science makes good courtroom evidence" and that PLP would prove its case with quality scientific data. PLP offered expert testimony from a toxicologist, a hydrologist, and a fish biologist. Each of these experts analyzed publicly-released data from PLP's Environmental Baseline Series, and then offered scientific opinions based on the data. The contrast between the two sides' experts was significant. For example, plaintiffs relied on a chemist, Kendra Zamzow, who combed through PLP's water chemistry data set and identified three data points, out of some 30,000, which potentially indicated evidence of acid-rock reactions. PLP's experts demonstrated that these three data points were obvious errors, that no scientist would consider them reliable, and that the remainder of the massive data set showed remarkably stable, pure, and pristine water chemistry throughout the deposit area. The court found Dr. Zamzow's testimony unreliable and instead relied on the opinions and testimony offered by PLP's experts.

PLP also presented the testimony of site manager Gernot Wober and Vice-President Ken Taylor. Both witnesses offered detailed testimony about how PLP has established its operations

to minimize environmental impacts. Given these witnesses' broad career backgrounds and detailed knowledge, the court found their testimony helpful, credible and reliable.

In the end, the judge did exactly what a judge is supposed to do. He listened to the evidence, weighed the credibility of the witnesses, and then made a decision based on the evidence. PLP and the State prevailed because plaintiffs failed to produce any evidence to support their allegations of harm, and because PLP's team introduced contrary evidence proving the absence of harms. PLP's environmental baseline data, its site operations, its expert consultants, and its management team all assisted in reaching this result.